WC 09-152

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of Petition for Declaratory Ruling to the Iowa Utilities Board and Contingent Petition for Preemption	WC Docket No. 09-___

PETITION FOR DECLARATORY RULING TO THE IOWA UTILITIES BOARD AND CONTINGENT PETITION FOR PREEMPTION

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TABLE OF CONTENTS
(Cont'd)

Page

Great Lakes Communications Corp. and Superior Telephone Cooperative (collectively, the "Petitioners"), by their undersigned counsel and pursuant to 47 C.F.R. § 1.2, hereby submit this Petition for Declaratory Ruling to respectfully request a ruling from the Federal Communications Commission ("Commission") that all matters relating to interstate access charges, including the rates therefor and revenue derived therefrom, are within its exclusive federal jurisdiction and thus any attempts by state authorities to regulate interstate access charges are beyond their authority. In addition, as a contingency against an imminent ruling from the Iowa Utilities Board (the "IUB" or "Board", and the "*IUB Order*") that encroaches on the Commission's jurisdiction, Petitioners respectfully request an order preempting such action under the standard for the federal preemption of state actions discussed in *Louisiana Public Service Commission v F.C.C.* [1]

I. INTRODUCTION

This Petition seeks to ensure that federal jurisdiction over interstate access will be maintained throughout the resolution of many access-charge related actions across the United States. The case most imminently to be decided is the enforcement action before the IUB entitled *Qwest Communications Corp. v. Superior Telephone Cooperative, et al.*, Docket FCU 07-2. That proceeding, which was initiated on the Complaint of Qwest Communications Corporation ("Qwest"),[2] seeks to determine the rights of eight local exchange carriers ("LECs") in Iowa to receive intrastate and interstate terminating access charges for telephone calls.

Qwest's complaint was premised on its assertion that the LECs' termination of calls to conference, chat-line, and in some cases, international service providers constituted "traffic pumping" that is somehow unlawful. The Qwest complaint is just one facet of Qwest's unlawful

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1 *Louisiana Public Service Commission v. F.C.C.*, 476 U.S. 355, 368-69 (1986) ("*Louisiana PSC*").

2 Docket No. FCU-07-2, Complaint, Request for Declaratory Relief and Request for Emergency Injunctive Relief filed with the Iowa Utilities Board on February 20, 2007.

campaign against competing carriers and conference-service providers — a campaign that includes harassing litigation in venues across the country and unlawful self-help refusals to pay access charges — that Qwest and other large interexchange carriers have been conducting for more than three years.

The IUB seems poised to adopt Qwest's arguments and assertions. In this Petition, Petitioners demonstrate that the *IUB Order* is likely to be flatly inconsistent with the rulings and policies of this Commission in areas where this Commission and federal statutes have occupied the field. The *IUB Order* is also likely to be extraordinarily expansive in scope, given the lengths to which Qwest sought to collaterally attack the Commission's holding and analysis in the *Farmers and Merchants* decision.[3] Any order by the IUB that touches, even on a prospective basis, the interstate access rates and revenues of LECs, or the qualification of the LECs for the rural exemption from the benchmark limit under the *CLEC Access Charge Order*,[4] would be in excess of the IUB's jurisdiction. As demonstrated in this Petition, the IUB is jurisdictionally incapable of regulating any more than a *de minimis* portion of the traffic that is the subject of Qwest's complaint. Further, even for that minuscule amount of intrastate traffic, the IUB must conform its ruling so that the LECs can comply simultaneously with the Commission's rules and regulations as well as the *IUB Order*. The Commission must therefore stand at the ready to preempt any order issued out of the IUB that misreads and ignores established Commission precedent and is *ultra vires*, as all indications seem to suggest the forthcoming *IUB Order* will be.

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[3] *Qwest Commc'ns Corp. v. Farmers and Merchants Mutual Tel, Co.*, Memorandum Opinion and Order, 22 FCC Rcd. 17973 (Oct. 2, 2007) ("*Farmers and Merchants*").

[4] *Access Charge Reform*, CC Docket No. 96-262, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd. 9923 (2001) ("*CLEC Access Charge Order*").

II. THE IUB HAS HELD A PUBLIC DECISION MEETING IN WHICH IT ISSUED SEVERAL FINDINGS THAT REGARD OR DIRECTLY IMPACT INTERSTATE TELECOMMUNICATIONS

The IUB held a decision meeting on August 14, 2009 to announce its preliminary ruling in Docket FCU 07-2 and to outline the content of the *IUB Order*. Ignoring the Commission's holding and analysis in *Farmers and Merchants*, the Board held that the LECs' conference service provider customers were not "end users" under both the LECs' interstate and intrastate tariffs. The Board found, in clear conflict with *Farmers and Merchants*, that calls to conference-calling and chatline bridges did not terminate at the bridge. The Board based this decision on the clearly erroneous belief that the pending Petition for Reconsideration of the *Farmers and Merchants* decision made it not final, and hence not binding on the Board. The Board went so far as to say that it possessed a more comprehensive record than the Commission possessed in *Farmers and Merchants*. The Board also found, in clear conflict with *Jefferson, Beehive*, and *Frontier*, which the Board found to be inapplicable, that the sharing of revenue between rural carriers with high access charge rates and chatline or conference-calling providers was unreasonable. The Board even weighed in on the LECs qualifications for the rural exemption under the *CLEC Access Charge Order*. The Board is going to require refunds of access charges to IXCs, yet failed to identify whether intrastate or interstate revenues were to be refunded. The Board is also going to require the LECs to report to the Board how each is using its NXX codes, and return any unused blocks of numbers to NANPA. Clearly, all of these actions greatly exceed the authority of the Board, and step well into the jurisdiction of the Commission.

III. STANDARD FOR GRANTING PETITIONS FOR DECLARATORY RULING

Section 1.2 of the Commission's rules provides that the "Commission may, in accordance with section 5(d) of the Administrative Procedure Act, on motion or on its own motion issue a

declaratory ruling terminating a controversy or removing uncertainty." 47 C.F.R. § 1.2. Thus, a declaratory ruling is an appropriate vehicle to restate established law or clarify any perceived uncertainty under existing Commission regulations or precedent.[5] Where, as here, the subject matter of the petition for declaratory ruling concerns issues over which the Commission has exclusive jurisdiction — *i.e.*, access charges for interstate telecommunications traffic— "the need for agency expertise and for uniformity of decisions" demand that this Commission provide guidance to the courts and state commissions. *Alltel Tennessee, Inc. v. Tennessee Pub. Serv. Comm'n*, 913 F.2d 305, 310 (6th Cir. 1990). This is particularly the case where the "actions of the state [commission] are necessarily intertwined with federal actions" and the "ultimate issue in this case" is whether the state commission has exceeded its jurisdictional authority. *Id.* at 309-310.

Petitioners file this request in advance of the *IUB Order* on the ground that they would be irreparably harmed, as described below, were any order issued that seeks to nullify or affect their interstate access service. As such, this Petition is not premature or unripe. Federal agencies are not constrained by Article III "case or controversy" limitations, but rather they "may issue a declaratory order in mere anticipation of a controversy or simply to resolve an uncertainty." *Pfizer, Inc. v. Shalala*, 182 F.3d 975, 980 (D.C. Cir. 1999).

IV. ALL ISSUES RELATED TO INTERSTATE ACCESS CHARGES FALL WITHIN THE COMMISSION'S EXCLUSIVE FEDERAL JURISDICTION

Congress granted the Commission exclusive jurisdiction over interstate telecommunications in the Communications Act of 1934, 47 U.S.C. §§ 151 *et seq.* (West 2001). Congress created the Commission

> [F]or the purpose of regulating interstate and foreign commerce in communication by wire ... and for the purpose of securing a more

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5 *See Universal Service Contribution Methodology*, 23 FCC Rcd. 1411, ¶ 1 (2008).

> effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, ...

Id. § 151. Congress then assigned the matters entrusted to the Commission's jurisdiction:

> ... [A]ll interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; ...

Id. § 152(a).

The Supreme Court made clear in *Smith v. Illinois Bell Telephone Co.*, 282 U.S. 133, 148 (1930), that matters of interstate communications are entrusted to federal agencies, stating, "The separation of the intrastate and interstate property. . . is essential to the appropriate recognition of the competent governmental authority in each field of regulation." The Commission recently reiterated this well-settled principle:

> When a service's end points are in different states or between a state and a point outside the United States, the service is deemed a purely interstate service subject to the Commission's exclusive jurisdiction.[6]

In the case before the IUB, Qwest and other interexchange carriers ("IXCs") are attacking, directly and indirectly, the rates, terms, revenue derived from and conditions applied to terminating access for such "purely interstate" calls. Were the IUB to adopt this type of relief, it would undeniably encroach upon the FCC's exclusive federal jurisdiction.

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[6] *In the Matter of Vonage Holdings Corporation, Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, 19 FCC Rcd. 22404, 22413 ¶ 17 (2004) ("*Vonage Order*").

V. THE COMMISSION HAS ALREADY RESOLVED THE ISSUE OF LEC ACCESS CHARGES UNDER IDENTICAL CIRCUMSTANCES: *JEFFERSON*, *BEEHIVE*, *FRONTIER*, AND *FARMERS AND MERCHANTS*

Since the access charge regime was established in 1984, there has been continuous litigation between LECs and IXCs over the rates and volumes of exchange access traffic. The anticipated *IUB Order* at issue in this Petition is part of the most recent bout of access charge litigation.

The current access disputes began in the late 1990s with the advent of "chat-line" services. In December 1996, AT&T filed a Section 208 complaint against Jefferson Telephone Company, a rural ILEC based in Iowa. The Commission denied the AT&T complaint in an Order issued in 2001.[7] AT&T's complaint was identical to the complaint raised by Qwest in the IUB proceeding: Jefferson Telephone entered into a commercial agreement with International Audiotext Network ("IAN"), a provider of chat-line services. IAN "[marketed] and otherwise [aided] the chatline operations" and Jefferson made payments to IAN "based on the amount of access revenues that Jefferson received for terminating calls to IAN."[8]

AT&T's complaint charged that Jefferson violated § 201(b) of the Communications Act because it "acquired a direct interest in promoting the delivery of calls to specific telephone numbers." AT&T also argued that the "access revenue-sharing arrangement with IAN" was unreasonably discriminatory, in violation of § 202(a) of the Act, because Jefferson did not share revenues with all its customers.[9] The Commission rejected both these arguments and denied AT&T's complaint.

The following year, the Commission issued two more orders, denying similar complaints by AT&T directed at LECs that shared access revenues with chat-line operators. In *AT&T v.*

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7 *AT&T Corp. v. Jefferson Tel. Co.*, 16 FCC Rcd. 16130 (2001) ("*Jefferson*").
8 *Id.* at 16131-2, ¶¶ 2-5.
9 *Id.* at 16133, ¶ 5.

Frontier Communications, the Commission rejected AT&T's allegations that "revenue-sharing arrangements" constituted unreasonable discrimination in violation of § 202(a) or violations of the ILECs' common carrier duties under § 201(b).[10] In *AT&T v. Beehive Telephone*,[11] the Commission again denied AT&T's complaint against a LEC that engaged in a commercial relationship with a chat-line provider. The *Jefferson*, *Frontier*, and *Beehive* decisions all dealt with exactly the same commercial arrangement that the IXCs characterize as "traffic pumping," despite the fact that it is the IXCs' customers who initiate the traffic. None of these decisions were appealed.

In 2006, the large IXCs developed a new strategy: rather than risk further adverse decisions by filing complaints with the Commission, Qwest, AT&T, Verizon, Sprint and other large IXCs began a coordinated campaign of self-help by simply refusing to pay the access charges billed by rural LECs. This forced the LECs to initiate collection actions in federal district court, and to incur the costs and delay associated with federal court litigation. In some cases, the IXCs filed complaints against the LECs in federal court, in an exercise of forum shopping in anticipation of collection actions. Of course, these complaints also had the effect of imposing legal costs on the LECs. In so doing, the IXCs imposed a "cost/price squeeze" on these rural carriers in two ways: they withheld payment of lawful access charges in an unlawful campaign of self-help, while imposing costs on the LECs by forcing them to defend harassing and meritless litigation. As a result of this coordinated campaign by the large IXCs — which has now been proceeding for over three years — they have succeeded in preventing some LECs from building out their networks to serve their rural communities, have caused other LECs to lay off

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[10] *AT&T Corp. v. Frontier Commc'ns of Mt. Pulaski, Inc.*, 17 FCC Rcd. 4041, 4142, ¶¶ 1, 2 (2002) ("*Frontier*").

[11] *AT&T v. Beehive Tel. Co.*, 17 FCC Rcd. 11641 (2002) ("*Beehive*").

employees, and in some cases, have driven LECs or chat and conference operators out of business.

In the most recent Commission case regarding terminating access, Qwest filed with this Commission a formal complaint on May 2, 2007, against Farmers and Merchants Mutual Telephone Company ("Farmers"), an Iowa LEC that Qwest accused of "traffic pumping." Qwest asserted that it had no obligation to pay the LEC's invoiced access charges. In late 2007, the Commission rejected Qwest's arguments. Though the Commission did agree with Qwest that, as a rate-of-return carrier, Farmers may have over-earned, it rejected all of Qwest's other arguments, and found that:

- Farmers did not violate Sections 203 or 201(b) of the Act by imposing terminating access charges on traffic bound for conference calling companies.[12]
- The Farmers' tariff allows Farmers to assess terminating access charges on calls to conference calling companies.[13]
- Conference calling companies are end users as defined in Farmers' tariff, and access charges have been properly imposed under that tariff.[14]
- Farmers' payment of marketing fees to the conference calling companies does not alter their status as end users under Farmers' tariff. In addition, whether the conference calling companies paid Farmers more than Farmers paid them is irrelevant.[15]
- Qwest failed to prove that the conference calling company-bound calls do not terminate in Farmers' exchange. Qwest also failed to prove that Farmers' imposition of terminating access charges was inconsistent with its tariff.[16]
- Farmers' tariffed rates were "deemed lawful" and so the LEC was not responsible for making refunds.[17]

Qwest filed a Petition for Reconsideration of the *Farmers and Merchants* decision more than 16 months ago, which the Commission is still apparently considering.

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12 *Farmers and Merchants Order* at 17985, ¶ 30.
13 *Id.* at 17987, ¶ 35.
14 *Id.*
15 *Id.* at 17987, ¶ 38.
16 *Id.* at 17987, ¶ 39.
17 *Farmers and Merchants Order* at 19983-84, ¶ 27.

There are now at least 17 federal court cases pending in district courts across the country reviewing the continuing refusal of IXCs to pay for the access services provided by rural LECs for terminating the IXCs' customers' calls to conferencing service providers.[18] The Federal District Court for the Southern District of New York recently referred an issue from a pending access charge collection action to the Commission – AT&T's claim that commercial relationships between LECs and chat/conference operators constitute a "sham" arrangement that voids the LECs' tariffs.[19] Petitioners understand that a second referral of issues from a collection action/"traffic pumping" complaint proceeding was made by the Federal District Court of Minnesota on July 15, 2009.[20] Finally, three other actions involving the same issues are pending before the Federal District Court for the Southern District of Iowa.[21] These three cases involve three IXCs — Qwest, AT&T and Sprint — and several rural LECs. The parties in that case all acknowledged that the Commission's decision in the *Farmers and Merchants* case is directly relevant to their claims and/or defenses.

The Commission has incorporated all of the issues associated with the IXCs' "traffic pumping" complaints into a pending rulemaking proceeding in WC Docket No. 07-135. In two rounds of comments and numerous *ex parte* presentations, Qwest, AT&T, Verizon, Sprint and other IXCs have reiterated every argument they have made against LEC commercial agreements

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[18] *See Petition for Declaratory Ruling of All American Telephone Co., Inc., e.Pinnacle Communications, Inc., and ChaseCom to Reconfirm that Local Exchange Carrier Commercial Agreements with Providers of Conferencing, "Chat Line" and Other Services Do Not Violate the Communications Act*, filed with the Commission on May 20, 2009. In that Petition, and subsequent Answer, the three Petitioner LECs list 17 federal district court actions pending in Iowa, South Dakota, New York and Minnesota, all dealing with "traffic pumping" allegations, and demands for payment of access charges. The Commission has not yet put that Petition out for public comment, and has not assigned a docket number to the proceeding.

[19] *Id.*; *see also* File No. EB-09-MDIC-0003, Informal Complaint of AT&T (April 20, 2009).

[20] *Tekstar Communications, Inc. v. Sprint Communications Co., L.P.*, Case No. 0:08-cv-01130 (D. Minn. April 23, 2008).

[21] *AT&T Corp. v Superior Telephone Cooperative, et al.*, Docket No. 4:07-cv-00043 (S.D. Iowa Jan. 29, 2007); *Qwest Communications Corp. v. Superior Telephone Cooperative, et al.*, Docket No. 4:07-cv-00078 (S.D. Iowa Feb. 20, 2007); *Sprint Communications Company, L.P. v. Superior Telephone Cooperative, et al.*, Docket No. 4:07-cv-00194 (S.D. Iowa May 7, 2007).

with chat/conference/international operators in past proceedings before this commission, before the federal district courts, and before the Iowa Utilities Board.

Unfortunately, the Commission's use of party-specific complaint proceedings to address access charge issues related to chat-line and conference traffic over the last decade has not dissuaded the IXCs from a continual resort to self-help tactics. Because the final orders in the *Jefferson*, *Frontier*, *Beehive* and *Farmers and Merchants* cases came from adjudicatory proceedings, the IXCs have argued that minor changes in the underlying facts of the cases, or the legal theories raised by the IXCs, render those decisions inapposite. Nothing demonstrates this more clearly than Qwest's Proposed Findings of Fact and Conclusions of Law ("Qwest FFCL") in the IUB proceeding.[22]

VI. QWEST'S PROPOSED RELIEF IN THE IUB PROCEEDING IS AN INVITATION TO USURP THE COMMISSION'S AUTHORITY OVER INTERSTATE TELECOMMUNICATIONS

Qwest seeks relief from the IUB that would be comical in its jurisdictional overreach but for the fact that the Board appears receptive to Qwest's invitation to usurp this Commission's exclusive authority to regulate interstate telecommunications. As Qwest noted, "[a]t numerous times throughout [the IUB proceeding], the LEC Respondents have argued that the Board is without jurisdiction to hear or decide the issues involved. Each time, the Board has rejected the arguments, and stated that 'the Board has jurisdiction to hear all of these issues.' July 3, 2007 Order at 5."[23]

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[22] Petitioners are constrained from appending Qwest's FFCL or post-hearing briefs, because Qwest has asserted confidentiality over some portions of these documents. Though Petitioners are confident that the portions of these papers quoted or paraphrased herein are not confidential, caution dictates that the papers themselves not be appended.

[23] Qwest FFCL at 3.

A. THE QWEST PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW ILLUSTRATE THE JURISDICTIONAL OVERREACH OF THE IUB

These "issues" that the Board believes are within its jurisdiction include the following, as taken from the Qwest FFCL:

- Whether FCSCs [Qwest's acronym for conference service providers] are wholesalers or carriers, not end-users, and therefore calls delivered to FCSCs are not subject to interstate and intrastate switched access charges. Qwest FFCL No. 9.

- Whether end users must either own, lease, or control a building or buildings (or defined portions of a "building or buildings," which necessarily requires a lease or ownership) to become an end-user premises under the access tariffs. Qwest FFCL No. 11.

- Whether the LEC Respondents terminated any of the international calling, credit-card calling or pre-recorded playback calling at issue in this case. Qwest FFCL No. 13.

- Whether Great Lakes is entitled to intrastate or interstate switched access charges for *any* of its calls. Qwest FFCL No. 18.

- Whether LECs are entitled to *any* compensation for the calls delivered to numbers associated with FCSCs on the grounds that such calls are beyond the scope of the interstate and intrastate switched access tariffs. Qwest FFCL No. 20.

- Whether the sharing of interstate and intrastate access revenue is an unjust and unreasonable practice. Qwest FFCL No. 21.

- Whether it is an unjust and unreasonable practice for CLECs involved in "traffic pumping" to claim the rural carrier exemption from the benchmark limit under the *CLEC Access Charge Order*. Qwest FFCL No. 22.

- Whether the arrangements between the LEC Respondents and the FCSCs to obtain and share interstate and intrastate access revenues from long distance carriers through the offering of free calling services constitute unjust and unreasonable practices and constitute violations of the public interest and the LEC Respondents' certifications. Qwest FFCL No. 23.

- Whether Great Lakes failed to satisfy the rural carrier exemption from the benchmark limit under the *CLEC Access Charge Order*. Qwest FFCL No. 24.

- Whether "traffic pumping" is an unjust and unreasonable practice because it abuses numbering resources. Qwest FFCL No. 28.

- Whether LECs must immediately cease and desist sharing interstate and intrastate access revenues with FCSCs and immediately disconnect the telephone numbers associated with such services. Qwest FFCL No. 30.

- Whether LECs must immediately cease billing IXCs such as Qwest for interstate and intrastate switched access fees on FCSC traffic. Qwest FFCL No. 31.[24]

- Whether the Board's decision should be considered to be binding precedent that the Board intends to follow in any future "traffic pumping" cases. Qwest FFCL No. 36.

Each of Qwest's proposed findings of fact and conclusions of law listed above is plainly beyond the IUB's jurisdiction. But after the Commission ruled against Qwest in the *Farmers and Merchants* case, there can be no doubt that Qwest is seeking another bite at the apple.[25] Qwest argued to the Board that:

> The LEC Respondents also rely upon *AT&T Corporation v. Jefferson Telephone Company*, 16 FCC Rcd. 16130 (2001), and claim this decision and its progeny show the FCC has already found traffic pumping schemes are legal. The cases do not stand for the propositions cited by the LEC Respondents. . . The LEC Respondents arguments [sic] attempt to read more into the [Jefferson] decision than exists. No matter how many times the LECs say "*Jefferson*" and "*Farmers and Merchants*" it does not change the unalterable fact that these decisions do not help them in the slightest.[26]

To the contrary, *Jefferson* and *Farmers and Merchants* are dispositive in favor of Petitioners.

Sprint even went a step further at the hearing and stated that the IUB effectively has the authority to reverse the Commission's holding in *Farmers and Merchants*: "[T]herefore we don't know what [the Commission is] going to say, so [the *Farmers and Merchants*] order couldn't possibly be the final answer, which is what we're asking this Board to do for us."[27]

Thus, despite a decade of consistent rulings on exactly the same fact patterns — rural LECs' collection of access charges for calls made to chat and conference service operators —

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[24] Qwest did not seek to hide that it is asking the Board to regulate the rates of the LEC Respondents. When asked whether the rate levels themselves were being challenged, Qwest's expert witness, Jeffrey Owens, stated that Qwest was asking the Board to make a determination that the LECs did not qualify for the rural exemption and accordingly be required to mirror the ILECs' rates, "so in that sense Qwest is addressing the rates in this proceeding." IUB Hearing Transcript at 568:5-16. All excerpts from this transcript are public, non-confidential documents and are appended as **Exhibit A** to this Petition.

[25] Qwest's expert witness, Jeffrey Owens, opined that "the whole question in this proceeding is does that tariff, that *interstate* tariff, apply to the traffic that Qwest has delivered to the LECs[.]" IUB Hearing Transcript at 612:25-613:2 (emphasis added).

[26] Qwest FFCL at 30.

[27] Testimony of James Appleby (Sprint), IUB Hearing Transcript at 1809:14-17.

that have consistently ruled in favor of LECs, the IXCs are contending that the FCC decisions do not matter because they come out of party-specific adjudicatory proceedings. The IUB appears poised to adopt these arguments and attempt to fill this perceived void by creating its own law on the matter, in complete disregard of Commission precedent. Unless preempted, this would have the effect of overturning the Commission's rulings in *Jefferson, Frontier, Beehive* and *Farmers and Merchants* as they apply to interstate traffic exchanged in Iowa, and would pre-judge issues now under active consideration by the Commission in at least one currently docketed rulemaking proceeding.

B. QWEST SEEKS A RULING FROM THE IUB THAT WOULD EXCEED THE IUB'S JURISDICTION IN OTHER WAYS

1. International and VoIP Calls Are Within the Exclusive Jurisdiction of the Federal Communications Commission

Qwest expressly seeks a determination from the IUB that terminating switched access charges cannot apply to conference calls made using Internet-protocol based calling cards, or to calls that are routed to overseas numbers. Qwest FFCL No. 13. The impropriety of such a ruling is clear on its face. Under the Communications Act of 1934, the Commission is vested with exclusive jurisdiction over interstate and international traffic. 47 U.S.C. § 152. Moreover, the Commission has on multiple occasions asserted exclusive jurisdiction over Internet-based communications,[28] including IP-based calling card calls.[29]

2. The IUB Has No Authority to Regulate the Use of Numbering Resources

Qwest also invites the IUB to find that "traffic pumping" is unreasonable because it "abuses numbering resources." Qwest FFCL No. 28. The Commission has exclusive jurisdiction over numbering resources, and this issue falls within its exclusive authority. 47

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[28] *Vonage Order*, 19 FCC Rcd. 22404 (2004).

[29] *AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services*, 20 FCC Rcd. 4826 (2005).

U.S.C. § 251(e)(1) ("The Commission shall have exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States.") The appropriate way for a state regulatory authority to address numbering-resource concerns is to petition the Commission for delegated authority, which the IUB has not done.[30]

Given the pendency of at least 17 different federal court actions in at least four different districts, and the multiple referrals to this Commission, it is apparent that the issues involving rural LEC commercial agreements with conference and chat-line operators are of nationwide importance. The Commission must provide the national guidance that the courts, state regulators and the industry require. In order to provide such guidance, the Commission should declare that the rates for, terms of, and revenue derived from interstate access service are within its exclusive jurisdiction, and that any contrary order from the IUB is preempted.

C. THE BOARD'S PREVIOUS ORDERS IN DOCKET FCU 07-2 DO NOT DISPLAY A CLEAR DELINEATION BETWEEN INTRASTATE AND INTERSTATE JURISDICTION

The Board's handling of several jurisdictional challenges in docket FCU 07-2 seems to indicate that it is willing to consider, and possibly resolve, matters that fall within the Commission's exclusive interstate jurisdiction. Several parties filed motions to dismiss based on the *de minimis* volume of intrastate traffic in dispute and Qwest's lack of standing to pursue discrimination claims.[31] In denying these motions, the Board stated it was "aware of its

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30 *Numbering Resource Optimization*, 15 FCC Rcd 7574, ¶ 7 (2000).

31 The scope of the IUB's authority is narrowly circumscribed by its enabling statute, much more so than other state regulatory bodies. Specifically, it cannot regulate the rates for services provided by the Petitioners, or by the other LECs that were the subject of its complaint action in Docket No. FCU-07-2. Iowa Code § 476.1 states that "mutual telephone companies in which at least fifty percent of users are owners, co-operative telephone corporations or associations [and] telephone companies having less than fifteen thousand customers and less than fifteen thousand access lines . . . are not subject to the rate regulations provided for in this chapter." All of the Petitioners meet these statutory criteria.

Of course, the effect of the Qwest's proposed relief is to regulate the LECs' rates if the IUB orders the LECs to refund the access fees they have collected from Qwest and the other IXCs to date, and prohibits them from collecting their tariffed access charges in the future. In so doing the IUB will have set a rate of zero for the services that the LECs provide to the IXCs in terminating the traffic at issue. *See Advamtel. LLC v. AT&T Corp.*, 118 F. Supp. 2d 680, 687 (E.D. Va. 2000) (finding that, if the tariffed rate does not apply to the collection of access charges, the IXC "will have received millions of dollars of services for free – surely, a result antithetical to the filed-

jurisdictional limits with respect to interstate and international traffic,"[32] but still allowed Qwest to proceed on all its claims. Several parties then sought to limit the scope of discovery to only matters related to intrastate matters and sought protection against the discovery of issues related to the terms, conditions, rates or revenues associated with interstate communications. These motions were denied again by the Board.[33] Again, according to Qwest, "[a]t numerous times throughout [the IUB proceeding], the LEC Respondents have argued that the Board is without jurisdiction to hear or decide the issues involved. Each time, the Board has rejected the arguments, and stated that 'the Board has jurisdiction to hear all of these issues.' July 3, 2007 Order at 5."[34]

At the Hearing itself, the Board seemed to acknowledge its jurisdictional limitations, but nonetheless asked Qwest how it can issue an order regarding interstate access:

> Board Member Tanner: You recommend the Board prohibit LECs from participating in traffic laundering. Again, if the Board only has intrastate access jurisdiction, how would this resolve the larger problem which also seems to be on the **interstate access side**?
>
> Qwest Expert Jeffrey Owens: **This you could solve both on the interstate and intrastate side** because you have control over the telephone numbers that are assigned to the LECs. You also have control over the certification of the LECs in terms of what territories they can serve.

IUB Hearing Transcript at 827:6-17 (emphasis supplied).

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rate doctrine."). But because Qwest is not willing to admit this fact, it establishes the fiction that it is merely regulating the "terms and conditions of service" to prevent "discrimination," a claim Qwest is wholly without standing to raise.

[32] Order Docketing Complaint, Setting Procedural Schedule, Denying Motion for Summary Judgment, Denying Motions to Dismiss, Denying Motion to Defer Discovery, and Denying Cross-Motion For Emergency Evidentiary Hearing at 12 (May 25, 2007). All Orders issued by the IUB and referenced herein are public and non-confidential documents and are appended as **Exhibit B** to this Petition.

[33] Order Denying Motion to Dismiss Moot Complaint, Granting Supplemental Motion to Compel, Denying Motion for Reconsideration, Granting Motion to Extend Hearing, and Setting Hearing, and Setting Amended Procedural Schedule (July 3, 2007).

[34] Qwest FFCL at 3.

When questioned a short time later by Qwest's counsel on redirect examination, Mr. Owens made clear that Qwest's strategy throughout the proceeding was to enable the Board to exercise authority over telecommunications regardless of its jurisdictional classification:

> Q. I would like to start on redirect with some questions from today's — specifically a question asked by Board Member Krista Tanner, and she said what ability, if any, does this Board have to prevent revenue sharing at both the intra and interstate levels, and you contemplated it was intrastate only. Do you recall that?
>
> A. Correct.
>
> Q. Does the Board have the ability to prevent discrimination of all types?
>
> A. I believe the rules of the Iowa Board give it that authority, yes.
>
> Q. Does the concept of revenue sharing, as we have in this case, contain facts where the local exchange carrier defendants are using **revenues from the interstate access regime** to provide kickbacks to their free calling partners?
>
> A. **In every instance, yes.**
>
> Q. And given the Board has jurisdiction over discrimination, have you rethought your answer to Board Member Tanner?
>
> A. Yes. **One additional tool the Board has** to consider the issues in this case is if it determines that the LECs are discriminating amongst customers in Iowa by giving — sharing switched access charges with some parties, but not others, because of the use of switched access charges with some parties, but not others, because of the use of switched access services to facilitate that discrimination, then it could order that such discrimination cease, which would prevent the LECs from using their interstate tariffs in that manner. So another way of putting it, they're using the **interstate tariff** to facilitate discrimination.

IUB Hearing Transcript at 837:8-838:18 (emphasis supplied).

Taken together these instances display a posture hostile towards the well-settled bounds of state commission jurisdiction. Though in each case the Board acknowledged "its jurisdictional limits with respect to interstate and international traffic," it nonetheless permitted this case to proceed on Qwest's attempts to enforce the tenets of federal telecommunications regulations and to invalidate federal access tariffs. Based on this history of the case, Petitioners

seek a reiteration of the restrictions on state agencies to resolve matters regarding terms, conditions, rates or revenues associated with interstate and international communications.

VII. ANY ACTION BY THE IUB RELATED TO INTERSTATE OR INTRASTATE ACCESS WOULD MERIT PREEMPTION UNDER THE *LOUISIANA PSC* TEST

The jurisprudence on the Commission's interstate jurisdiction being so clear, Petitioners respectfully request a ruling that any action by the IUB impinging on the rates, terms, or revenue derived from interstate or intrastate service is preempted. The bounds of federal jurisdiction to supplant state law were articulated by the Supreme Court in the *Louisiana PSC* case:

> The Supremacy Clause of Article VI of the Constitution provides Congress with the power to pre-empt state law. Pre-emption occurs when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law, *Jones v. Rath Packing Co.*, 430 U.S. 519, 97 S.Ct. 1305, 51 L.Ed.2d 604 (1977), when there is outright or actual conflict between federal and state law, *e.g.*, *Free v. Bland*, 369 U.S. 663, 82 S.Ct. 1089, 8 L.Ed.2d 180 (1962), where compliance with both federal and state law is in effect physically impossible, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963), where there is implicit in federal law a barrier to state regulation, *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983), where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947), or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress. *Hines v. Davidowitz*, 312 U.S. 52, 61 S.Ct. 399, 85 L.Ed. 581 (1941). Pre-emption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation. *Fidelity Federal Savings & Loan Assn. v. De la Cuesta*, 458 U.S. 141, 102 S.Ct. 3014, 73 L.Ed.2d 664 (1982); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 104 S.Ct. 2694, 81 L.Ed.2d 580 (1984).[35]

The Commission itself has noted that: "It is well-established that '[p]re-emption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may preempt state regulations.'"[36]

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[35] *Louisiana PSC*, 476 U.S. 355 at 368-69.

[36] *Federal-State Joint Board on Universal Service; Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities Commission*, 15 FCC Rcd. 15168, 15172, ¶ 8 (2000) (citing *Fidelity Federal Sav. and Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 153-54 (1982)).

The Commission has used this authority consistently to prevent the erosion of its jurisdiction, to implement its rules and policies on a nationwide basis, and to implement the mandates of the Communications Act.[37] Section 253 of the Communications Act, as amended by the Telecommunications Act of 1996, provides the Commission with express authority to preempt state regulations that "prohibit or have the effect of prohibiting the ability of an entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253. In addition, the Commission has found implied preemption authority in other sections of the Act, including Sections 154(i) and 251.[38]

As Petitioners demonstrate below, any IUB order that grants Qwest any of the relief it seeks would merit preemption under all the provisions of the *Louisiana PSC* test. Such an order would: (1) constitute a barrier to the competitive provision of both interstate and intrastate services, in contravention of § 253 of the Act; (2) directly contradict statements of law and policy established by this Commission; (3) make it impossible to comply with federal law and the IUB's decision; (4) effectively attempt to preempt Commission authority, ignoring the fact that the Commission has occupied the field by establishing rulemaking proceedings that are actively considering identical issues; and (5) is a direct impediment to the rules and policies established by this Commission.

A. CONGRESS HAS EXPRESSED A CLEAR INTENT TO PREEMPT STATE ACTIONS THAT RESTRICT COMPETITION

Section 253 of the federal Communications Act provides for the "Removal of Barriers to Entry." This section of the Act states:

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[37] *E.g.*, *Vonage Holdings Corp.*, 19 FCC Rcd. 22404 (2004); *Petition for a Declaratory Ruling filed by National Association for Information Services, Audio Communications, Inc. and Ryder Communications, Inc.*, 8 FCC Rcd. 698 (1993), *aff'd* 10 FCC Rcd. 4153 (1995).

[38] *See BellSouth Telecommunications, Inc. Request for Declaratory Ruling that State Commissions May Not Regulate Broadband Internet Access Services By Requiring BellSouth to Provide Wholesale or Retail Broadband Services to Competitive LEC UNE Voice Customers*, 20 FCC Rcd. 6830, 6839, ¶ 19 (2005).

> [253](a) IN GENERAL. – No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.
>
> * * *
>
> (b) STATE REGULATORY AUTHORITY. – Nothing in this section shall affect the ability of a State to impose, on a competitive neutral basis . . . requirements necessary to . . . protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.
>
> * * *
>
> (d) PREEMPTION. – If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such a violation or inconsistency.

As discussed below, the relief that Qwest seeks would restrict both intrastate and interstate competition in multiple respects, and so falls within the express Congressional preemption mandate.

Qwest asks the Board to revoke the certificate Great Lakes on the grounds that they have engaged in unreasonable conduct. Qwest FFCL No. 26. Specifically, Qwest seeks to de-certify Great Lakes on the ground, among others, that it enters into contractual arrangements with conference and chat-line operators and shares access revenues with them. Qwest can cite to no Commission precedent to support this finding, and there is none. In fact, as discussed above, the Commission on four separate occasions — in its *Jefferson*, *Frontier*, *Beehive*, and *Farmers and Merchants* decisions — has rejected identical Qwest and AT&T arguments against identical conduct. Therefore, with respect to interstate access traffic at a minimum, the IUB has neither the jurisdiction nor the grounds to seek revocation of the LECs' certifications.

Any attempt by the IUB to decertify the LECs on the grounds of providing service to conference-calling and chat-line service providers must fail because the statutory standards that apply under both the Iowa Code and the federal Communications Act are essentially identical

and the Commission has found such conduct to be lawful. The regulatory standard promulgated in Section 476.3 of the Iowa Code states: "When the board, after a hearing held after reasonable notice, finds a public utility's rates, charges, schedules, service, or regulations are unjust, unreasonable, discriminatory, or otherwise in violation of any provision of law, the board shall determine just, reasonable, and nondiscriminatory rates, charges, schedules, service, or regulations to be observed and enforced." This standard is essentially the same as the test under which the Commission evaluated the complaints in its four decisions dealing with conference calling and chat-line traffic. Section 201(b) of the Communications Act states that: "All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful[.]" Therefore, since the standards are the same, if the LECs' conduct is lawful under federal law, it is necessarily lawful under Iowa state law.

The IUB's potential de-certification would directly prevent these two CLECs from providing intrastate service, and would force them out of the local Iowa market. In so doing, this action "prohibit[s] . . . the ability of [the CLECs] to provide any . . . intrastate telecommunications service" and so contravenes Section 253(a) of the Act.

B. QWEST'S PROPOSED RELIEF PRESENTS AN OUTRIGHT AND ACTUAL CONFLICT WITH ESTABLISHED FEDERAL LAW

Qwest asks the Board to expressly find that four seminal Commission decisions regarding issues that are identical to those under consideration in Iowa Docket FCU-07-2 are "inapposite" and to be ignored.[39] The IUB, however, is required to follow all of the Commission's decisions,

[39] Qwest FFCL at 30. In addition, Qwest's post-hearing brief flatly instructs the Board to "ignore" the *Farmers and Merchants Order*.

including the *Farmers and Merchants* decision. Thus, were it to grant Qwest's requested relief, the Board will contravene prevailing federal law.

1. Qwest's requested relief would require the Board to flout the Commission's orders governing interstate terminating access.

The Board cannot render a decision that ignores or violates the Commission's clear holding in *Farmers and Merchants* that traffic to any entity satisfying the NECA definition of "end user" and "customer" is compensable for terminating access. That *Farmers and Merchants* is the subject of a Petition for Reconsideration makes no difference. Section 1.106(n) of the Commission's Rules makes clear that reconsideration requests do not stay the effect of a Commission order:

> Without special order of the Commission, the filing of a petition for reconsideration shall not excuse any person from complying with or obeying any decision, order, or requirement of the Commission, or operate in any manner to stay or postpone the enforcement thereof.

Of course, neither the IUB nor Qwest has received such a special order from this Commission, and the *Farmers and Merchants* decision is binding law on the facts of this case.

Qwest asks the Board to find that the Commission's decisions in *Jefferson, Frontier*, and *Beehive,* as well as *Farmers and Merchants*, are all inapposite because they were the result of party-specific adjudications and were narrowly decided on the facts of the individual cases. This invitation is wholly improper on two counts: First, the Commission routinely uses the formal complaint process to establish precedent that controls the conduct of other carriers in similar circumstances. The *Jefferson*, *Frontier*, *Beehive* and *Farmers and Merchants* cases addressed exactly the same traffic that is the subject of the IUB FCU-07-2 docket — calls terminating to conference and/or chat-line operators. Those cases challenged exactly the same conduct — commercial agreements in which LECs shared interstate and intrastate access revenues. And the IXCs in those cases sought exactly the same relief — refunds of access charges paid, and

absolution from the obligation to pay the tariffed rates in the future. In fact, the *Frontier* decision is only a single paragraph followed by two ordering paragraphs. The Commission needed only two sentences to dismiss AT&T's complaint:

> The issues raised in this Complaint are identical to those raised and denied in *AT&T Corp. v. Jefferson Telephone Co.* Thus, for reasons explained therein, we conclude that AT&T has failed to meet its burden of demonstrating that Defendants violated either section 202(a) or section 201(b) of the Act, and therefore deny AT&T's complaint in its entirety.[40]

These cases establish a body of law that constitutes *stare decisis*, and binds the IUB to apply that law to the facts in this case as a matter of federal law.

2. Qwest seeks to prohibit revenue sharing by carriers which stifles both intrastate and interstate competition.

Qwest is requesting a ruling from the IUB that prohibits all sharing of access revenue, including interstate revenue, between LECs and conference calling companies. Qwest FFCL Nos. 23, 30. Qwest does not attempt to differentiate between revenue sharing arrangements for intrastate and interstate services, and of course such jurisdictional parsing is impossible.

Any such prohibition of revenue sharing directly contradicts established Commission policy. In fact, the Commission has found that revenue sharing benefits the public by allowing the introduction of new, innovative services, and provides revenue options for startup companies that may otherwise not be able to enter the market to compete. This policy is most broadly stated in the Commission's treatment of business relationships between LECs that provide DSL and other wireline broadband services and independent Internet service providers ("ISPs"):

> The record demonstrates that allowing non-common carriage arrangements for wireline broadband transmission will best enable facilities-based wireline broadband Internet access service providers, particularly incumbent LECs, to embrace a market-based approach to their business relationships with ISPs, providing the flexibility and freedom to enter into mutually beneficial commercial arrangements with particular ISPs.

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[40] *Jefferson*, 16 FCC Rcd. at 16131, ¶ 1 (citations omitted).

* * *

> Non-common carriage contracts will permit ISPs to enter into various types of compensation arrangements for their wireline broadband Internet access transmission needs that may better accommodate their individual market circumstances. For example, ISPs and facilities-based carriers could experiment with revenue-sharing arrangements or other types of compensation-based arrangements keyed to the ISPs' marketplace performance, enabling the ISPs to avoid a fixed monthly recurring charge (as is typical with tariffed offerings) for their transmission needs during start-up periods. . . . Moreover, it encourages other types of commercial arrangements with ISPs, reflecting business models based on risk sharing such as joint ventures or partnership-type arrangements, where each party brings their added value, benefiting both the consumer (through the ability to obtain a new innovative service) and each party to the commercial arrangement.[41]

Because a ban on revenue sharing would discourage innovation and restrict competition for both intrastate and interstate services, the ban would run afoul of Commission precedent.

Moreover, the question of sharing the revenues derived from services identical to those in the case before the IUB was more recently discussed in the *Farmers and Merchants* case, and the Commission again refused to find that such conduct is in any way improper. Nor did the FCC accept Qwest's argument that revenue-sharing arrangements disqualify an entity from being an end user under applicable tariffs. The FCC knew in that case that the LEC shared revenue with its conference service provider customers, and unequivocally stated that "Farmers' payment of marketing fees to the conference calling companies does not affect their status as end users, for purposes of Farmers' tariff." *Farmers and Merchants*, 22 FCC Rcd. at 17987-88, ¶ 38. Were the IUB now to hold that any Petitioner should be deprived of terminating access because it shared revenue with a conference call or chat line provider, it would directly contravene settled federal precedent.

Secondly, the IUB is poised to reach specific conclusions that are diametrically opposed to the Commission's findings on identical facts. The chart below summarizes these direct

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[41] *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, 20 FCC Rcd. 14853, 14899-900, ¶¶ 87-88 (2005) (footnotes omitted) ("*Broadband Internet Access Order*").